Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATHWAY BELLOWS, INC.,

Petitioner,

—against—

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR, Trustees of the PENN CENTRAL TRANSPORTATION CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID H. DEITSCH
Attorney for Petitioner
45 John Street
New York, N. Y. 10038
(212) 233-0886

KENNETH R. FEIT
GATES, SINGER, DEITSCH,
WEINTRAUB & FASS,
Of Counsel
45 John Street
New York, N. Y. 10038

Questions Presented

1. Whether a written claim for damage pursuant to the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707,[1] must make demand for a specified dollar amount and include words such as "I claim."

2. Whether the authority of *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), has been superseded by the regulations of the Interstate Commerce Commission codified at 49 C.F.R. § 1005.2(b).

---

[1] At the time this proceeding arose, the provisions of the Carmack Amendment appeared at 49 U.S.C. § 20(11). The Interstate Commerce Act has since been recodified without substantive change pursuant to Act Oct. 17, 1978, P.L. 95-473, § 3, 92 Stat. 1466.

PAGE

Questions Presented i

Opinions Below 1

Jurisdiction 2

Statutes and Regulatory Provisions Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

I. The decision below is in direct conflict with the decision of this Court in *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), and conflicts squarely with the decision of another Circuit in *Wisconsin Packing Co.* v. *Indiana Refrigerator Lines*, 618 F. 2d 441 (7th Cir. 1980) (en banc) *cert. denied* 49 U.S.L.W. 3247 (Oct. 6, 1980) (No. 79-1958) 6

II. Resolution by this Court of the conflict between the Circuits is necessary to effectuate the national transportation policy of uniform treatment of all shippers 11

Conclusion 12

APPENDIX A:

Opinion of the United States Court of Appeals for the Second Circuit A1

Opinion of United States District Court for the Southern District of New York A12

Opinion Upon Reargument of USDC SDNY A19

APPENDIX B:

Statutes & Regulations B1

PAGE

Adams Express Co. v. *Croninger,* 226 U.S. 491 (1913) 11, 12

Atchison, T. and S.F. Ry. v. *Littleton Leasing and Investment Co.,* 582 F.2d 1237 (10th Cir. 1978) .. 11

Delaware L. & W. R.R. v. *United States,* 123 F. Supp. 579 (S.D.N.Y. 1954) 8

Ex Parte No. 263, 340 I.C.C. 555 10

Georgia, Fla. & Ala. Ry. v. *Blish Milling Co.,* 241 U.S. 190 (1916) .....i, 6, 7, 8, 9, 11

Illinois Steel Co. v. *Baltimore & O. R.R.,* 320 U.S. 508 (1943) 11

Ins. Co. of North America v. *Newtowne Mfg. Co.,* 187 F.2d 675 (1st Cir. 1951) 8

Perini-North River Assoc. v. *Chesapeake & O. Ry.,* 562 F.2d 269 (3d Cir. 1977) 11

Thompson v. *James G. McCarrick Co.,* 205 F.2d 897 (5th Cir. 1953) 8

Wisconsin Packing Co. v. *Indiana Refrigerator Lines,* 618 F.2d 441 (7th Cir. 1980) (en banc) cert. denied 49 U.S.L.W. 3247 (Oct. 6, 1980) (No. 79—1958) 6, 7, 8, 9, 12

Statutes and Regulations Cited

PAGE

28 U.S.C. § 1253(1) 2

49 U.S.C. § 11707 ..... 2, 11

49 U.S.C. § 20(11) 2, 4

49 U.S.C. § 10101 ..... 2, 12

National Transportation Policy, Act Sept. 18, 1940 c. 722, Title 1, § 1, 54 Stat. 899 ..... 2, 12

49 C.F.R. § 1005.2(b) .....i, 2, 5, 6, 8, 10, 11

49 C.F.R. § 1005.2(d) 10

Miscellaneous

Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, 49 C. F. R. 1005.2 2

Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I. C. C. 515 (1972) 6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATHWAY BELLOWS, INC.,

Petitioner,

against

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR, Trustees of the PENN CENTRAL TRANSPORTATION CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Pathway Bellows, Inc., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 2, 1980.[2]

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, appears at pages A1-A11 of Appendix A. The opinions of the District

[2] The names of all parties to this proceeding in the court below are set forth in the caption.

Court for the Southern District of New York are unreported and appear at pages A12-A18 and A19-A20 of Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit in this proceeding was entered on September 2, 1980. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is thus invoked under 28 U.S.C. § 1254(1).

Statutes and Regulatory Provisions Involved

This action arose under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707, which appears at pages B1-B3 of Appendix B to this Petition. At the time this action arose, the provisions of the Carmack Amendment were found at 49 U.S.C. § 20(11).

The National Transportation Policy, 49 U.S.C. § 10101, appears at pages B3-B4 of Appendix B. This provision is the successor to Act, Sept. 18, 1940 c. 722, Title 1, § 1, 54 Stat. 899.

The pertinent portions of the regulations of the Interstate Commerce Commission involved, *Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage,* 49 C.F.R. § 1005.2, appear at pages B4-B6 of Appendix B.

Statement of the Case

This action was commenced by Petitioner to secure a money judgment for damages sustained to a shipment while being transported by rail in interstate commerce.

On September 24, 1974, at El Cajon, California, Petitioner delivered a shipment to the San Diego & Arizona Eastern Railway for transportation to Gouverneur Iron Works in Oswego, New York. The uniform straight bill of lading issued by the San Diego & Arizona Eastern Railway to Petitioner acknowledged receipt of the shipment and contained the usual contract terms and conditions. Section 2(b) of the bill of lading provided as follows:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property. . . ."

On October 22, 1974, respondents delivered the shipment to the consignee in a damaged condition. That same day, Respondents' agent was requested to make a freight damage inspection. The following day, an inspection was made by Respondents' agent and a written report was prepared.

On May 12, 1975, Petitioner sent the following letter to Respondents:

> "Subject: Freight Damage
>
> Reference: Freight Inspection Report
> Sales No. 789242
> Way Bill No. 22598
> Rail Car SP509233, Car #1
> Rail Car SP508623, Car #2
>
> "Gentlemen:
>
> Although we have contacted your company earlier, the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage of a shipment to Gouverneur Iron Works, Oswego, New York."

This letter was received by Respondents on May 19, 1975, well within the nine-month period following delivery of the shipment. On July 22, 1975, the last day of the nine-month period, Petitioner mailed a second letter to the receiving railroad, the San Diego and Arizona Eastern Railway, which reported that the cost of repairing the freight damage amounted to the sum of $89,858.51 and further stated that "This letter is Pathway Bellows, Inc.'s formal claim to you as receiving carrier for damage in this amount." The letter was received by the San Diego and Arizona Eastern Railway one day later on July 23, 1975.

Finally, on July 31, 1975, Petitioner mailed further correspondence to Respondents and to the San Diego and Arizona Eastern Railway amending its claim to the sum of $90,157.34, which were received by the respective railroads in due course.

On May 5, 1975, Petitioner commenced this proceeding in the United States District Court for the Southern District of New York for damages in the sum of $90,157.34, invoking the jurisdiction of that court pursuant to the provisions of the Carmack Amendment, then found at 49 U.S.C. § 20(11), and in accordance with 28 U.S.C. § 1337.

The parties stipulated as to all of the pertinent facts, and agreed that Petitioner's freight damage amounted to the sum of $40,000.00. The single issue at controversy was whether Petitioner had complied with the written claim requirement of section 2(b) of the uniform bill of lading.

In its opinion dated June 13, 1979, the District Court granted Petitioner's motion for summary judgment, holding that the July 22, 1975 letter was timely filed, especially in view of the prior May 12, 1975 letter:

> "We hold that, at least here the shipper has furnished written notice within the period required by the bill of lading and that it is in the process of filing a claim for damage, and identifies that claim with some speci-

> ficity, such a claim when subsequently made and received by the carrier will be deemed to have been filed when it is deposited in the mail, not when it is received by the carrier." page A18, *infra.*

The May 12, 1975 letter to Respondents was held to not have properly stated a claim, since according to the District Court, it failed to assert that Respondents were liable for the freight damage and failed to include a specified or determinable amount of money as required by 49 C.F.R. § 1005.2(b).

The District Court allowed reargument, but adhered to its initial determination and judgment was entered in favor of Petitioner.

From that judgment Respondents appealed to the United States Court of Appeals for the Second Circuit, which reversed the judgment of the District Court. The Court of Appeals concurred with the District Court's view of the May 12, 1975 letter and the applicability of 49 C.F.R. § 1005.2(b), but held that the second, July 22, 1975 letter was not timely "filed" as required because it had not been received by the carrier within the nine-month period. Petitioner urges that the holding of the Second Circuit is erroneous and respectfully requests that a writ of certiorari issue to review the judgment and opinion of that court.

REASONS FOR GRANTING THE WRIT

I.

The decision below is in direct conflict with the decision of this Court in *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), and conflicts squarely with the decision of another Circuit in *Wisconsin Packing Co.* v. *Indiana Refrigerator Lines*, 618 F. 2d 441 (7th Cir. 1980) (en banc) *cert. denied* 49 U.S.L.W. 3247 (Oct. 6, 1980) (No. 79-1958).

The precise question which was before the Second Circuit in this proceeding was recently addressed and decided in an entirely different matter by the Seventh Circuit in *Wisconsin Packing Co.* v. *Indiana Refrigerator Lines*, 618 F. 2d 441 (7th Cir. 1980) (en banc) *cert. denied* 49 U.S.L.W. 3247 (Oct. 6, 1980) (No. 79-1958). Both Circuits raised the issue of whether *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), was still controlling authority or whether it had been superseded by 49 C.F.R. § 1005, *Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage*, a regulation adopted by the Interstate Commerce Commission following hearings reported in *Ex Parte No. 263: Rules, Regulations and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515 (1972). The Seventh Circuit held in *Wisconsin Packing* that *Blish Milling* provided the standard by which written freight claims were to be measured and that C.F.R. § 1005.2(b) was not applicable to litigated claims. The Second Circuit took the opposite view in its opinion in this proceeding, holding that the *Blish Milling* standard was in effect overruled by 49 C.F.R. § 1005.2(b). The Second Circuit expressly recognized that its holding was contrary to that rendered by the Seventh Circuit.

The extent of the conflict may best be shown by the similarity of the fact situations which were presented for review in each of these three cases. In *Blish Milling,* this Court held that the following telegram which had been preceded by other telegrams which identified the shipment, complied with the written claim requirement:

> "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle." 241 U.S. at 198.

In *Wisconsin Packing* the following memorandum was found to meet the written claim requirement:

> "Wisconsin Packing Company refused to accept meat on trailer no. 4013 because of Army [Navy] rejection of temperatures averaging 1.2 degrees over acceptable allowance temperatures. Return temperatures checked out and ranged from nine to twenty-five degrees." 618 F. 2d at 443.

Despite the above, the Second Circuit held that the following letter did not meet the requirements of section 2(b) of the uniform bill of lading:

> "Subject: Freight Damage
>
> Reference: Freight Inspection Report
> Sales No. 789242
> Way Bill No. 22598
> Rail Car SP509233, Car #1
> Rail Car SP508623, Car #2
>
> "Gentlemen:
>
> Although we have contacted your company earlier, the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage of a shipment to Gouverneur Iron Works, Oswego, New York."

The *Blish Milling* principle, followed by the Seventh Circuit in *Wisconsin Packing,* provided that the written claim clause of the bill of lading was intended to give the carrier notice, is "addressed to a practical exigency" and "does not require documents in any particular form." 241 U.S. at 198. This view is entirely consistent with section 2(b) of the uniform bill of lading which provides only that "claims must be filed in writing" and does not specify the contents of the claim or the form that it is to take. The courts have therefore applied a most liberal standard, holding that virtually any written document which identifies the shipment and indicates an intention to claim damages will satisfy the written claim requirement. *Ins. Co. of North America* v. *Newtowne Mfg. Co.,* 187 F. 2d 675 (1st Cir. 1951). In *Delaware L. & W. R.R.* v. *United States,* 123 F. Supp. 579 (S.D.N.Y. 1954), the court went so far as to state that a writing would meet the section 2(b) requirement if the carrier could draw no inference from it other than that a claim for damages was contemplated even if the document failed to include a formal demand for damages. In *Thompson* v. *James G. McCarrick Co.,* 205 F.2d 897 (5th Cir. 1953), it was said that a claim need not include the exact amount of the damages. The Second Circuit has rejected this approach, holding that the technical requirements of 49 C.F.R. § 1005.2(b) are now decisive of the issue. Accordingly, the Second Circuit held that Petitioner's May 12, 1975 letter to Respondents failed to meet two of the three requirements of the regulation because it did not include words such as "I claim" and failed to specify the damages claimed in terms of money, even though Respondents had actual notice of the damage, had in fact inspected the shipment the day after delivery and had in their possession the written report concerning the inspection.

According to the Seventh Circuit in *Wisconsin Packing,* this regulation was never intended to provide the standard by which courts are to measure the sufficiency of written freight claims. The regulation provides a set of proce-

dures designed to make voluntary settlements more expeditious and eliminate the need for shippers to commence legal proceedings in order to secure recovery for their freight claims. A further purpose of the formalized procedure set forth in the regulation was to prevent carriers from discriminating by paying the frivolous or spurious claims of favored shippers while rejecting the bona fide claims of other shippers. After suit is commenced, the question of the sufficiency of the claim is no longer a question to be decided solely by the carrier and hence the case law and not the regulation provides the governing standard for litigated claims. The regulation was intended to control the *processing* of claims only, and not to change the substantive law applied by the courts. 618 F. 2d at 441.

The Second Circuit has taken the opposite view, holding that this same regulation does provide the standard by which litigated claims are to be measured and made this most disturbing statement:

> "The minimum filing requirements appear to call for no more information than one ordinarily would expect a claim for damages to contain, and compliance with these requirements is neither onerous nor unreasonable. To the extent that carriers may escape liability, such 'windfalls' may be properly traced, not to the existence of the regulations, but to shippers' unexcused failures to comply with a reasonable condition contained in bills of lading." n.5 at page A8, *infra.*

In light of the language of section 2(b) of the uniform bill of lading which calls for no more than that a claim must be filed in writing, and the *Blish Milling* principle which has been consistently followed over the years, it is difficult to understand how the Second Circuit can arrive at such a conclusion, especially concerning an exculpatory provision and where the carrier was given actual notice in writing.

There is another important area in which the two circuits have taken contrary positions. The Seventh Circuit has stated that even if 49 C.F.R. § 1005.2(b) were applicable, the shipper would still be in a position to demonstrate its compliance despite the fact that in the *Wisconsin Packing* case, the writing did not specify the amount claimed. The Seventh Circuit, citing *Ex Parte No. 263,* 340 I.C.C. at 555, noted that the Interstate Commerce Commission recognized that the full extent of the loss or damage may at times not be ascertained until long after delivery and therefore the shipper must have opportunity to file a supplemental claim. 49 C.F.R. § 1005.2 (d) thus appears to allow payment of the shipper's damages if a timely claim for an uncertain amount is followed at any time thereafter by a claim which is fully in accord with 49 C.F.R. § 1005.2(b). Such is exactly what occurred in this proceeding, where Petitioner followed its initial May 12, 1975 letter with its further letter dated July 22, 1975 which was received by the originating railroad, the San Diego & Arizona Eastern Railway, one day after the nine-month period had run and which, without doubt, contained all of the necessary requirements set forth in 49 C.F.R. § 1005.2(b).

The Second Circuit, however, addressed this aspect of the case in an entirely different manner, placing the burden on the shipper to established that it "could not in the exercise of reasonable diligence, have ascertained the extent of its loss within the 9 month claim filing period . . . ." n. 10, page A11, *infra.* The regulation says nothing about the necessity for the shipper to demonstrate "reasonable diligence" before its supplemental claim is allowed consideration, nor does the Seventh Circuit perceive any such requirement. Once again, the Second Circuit has created an obstacle preventing shippers from recovering for their valid freight claims.

It is submitted that this case presents an important question of federal law requiring resolution by this Court. It is clear that the Second Circuit departed from the ap-

plicable authority of this Court and is in direct conflict with the Seventh Circuit. In addition, the decision of the Second Circuit herein is also in conflict with the decisions of other circuits in *Atchison, T. and S.F. Ry.* v. *Littleton Leasing and Investment Co.*, 582 F. 2d 1237 (10th Cir. 1978) and *Perini-North River Assoc.* v. *Chesapeake & O. Ry.*, 562 F. 2d 269 (3d Cir. 1977). Each of these cases arises out of shipments which were made after the effective date of 49 C.F.R. § 1005.2(b). Nevertheless, both of these courts applied the *Blish Milling* rule rather than taking the approach followed by the Second Circuit in this proceeding.

One need not be intimate with the transportation industry to appreciate that each and every day thousands of interstate shipments are made and thousands of uniform bills of lading are issued. This Court has held that the construction of the uniform bill of lading presents a federal question and that its language carries the force of federal law. *Illinois Steel Co.* v. *Baltimore & O. R.R.*, 320 U.S. 508 (1943). Each of these bills of lading contains the same section 2(b) written claim requirement. Inevitably, vast numbers of these shipments will result in freight claims and therefore, for the foreseeable future, the question raised in this petition will continue to be of critical importance to the shipping public.

II.

Resolution by this Court of the conflict between the Circuits is necessary to effectuate the national transportation policy of uniform treatment of all shippers.

One of the basic purposes of Congress in enacting the Carmack Amendment, 49 U.S.C. § 11707, was to require uniform treatment of shippers and to relieve the bill of lading contract from the diverse regulation to which it had previously been subject. *Adams Express Co.* v. *Croninger,*

226 U.S. 491 (1913). The direct conflict between the circuits as to which standard should govern the written claim requirement will render impossible the application of this important policy consideration. It is therefore most urgent that this Court intervene to resolve the conflict.

As has been seen above, the decisions of the two circuits are irreconcilable and cannot be distinguished. The result is that claims will be adjudicated differently depending upon the forum where heard.

Moreover, the differing standards will allow carriers to discriminate against some shippers and favor other shippers by applying the *Wisconsin Packing* rule to some claims and the Pathway Bellows rule to others. Only review by this Court can eliminate this inevitable result and thus effectuate the public policy considerations expressed in the *National Transportation Policy,* Act Sept. 18, 1940, c. 722, Title 1, Section 1, 54 Stat. 899, now codified at 49 U.S.C. § 10101.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 2, 1980.

Respectfully submitted,

David H. Deitsch
Attorney for Petitioner
45 John Street
New York, N. Y. 10038
(212) 233-0886

Kenneth R. Feit
Gates, Singer, Deitsch,
Weintraub & Fass
Of Counsel
45 John Street
New York, N. Y. 10038

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 882—September Term, 1979
(Argued March 19, 1980 Decided September 2, 1980)
Docket No. 79-7860

PATHWAY BELLOWS, INC.,
Plaintiff-Appellee,

—v.—

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR, TRUSTEES OF THE PENN CENTRAL TRANSPORTATION CO.,
Defendants-Appellants.

Before:

WATERMAN, MANSFIELD and TIMBERS,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, LEONARD B. SAND, *District Judge,* entered upon cross-motions for summary judgment, granting the motion of plaintiff-appellee on its freight damage claim and denying that of the defendants-appellants.

Reversed and remanded for entry of judgment in favor of defendants-appellants.

WATERMAN, *Circuit Judge:*

Defendants-appellants, Trustees of the Penn Central Transportation Co. (Penn Central), appeal from a judgment entered in the United States District Court for the

Southern District of New York (Sand, District Judge), which granted the motion of plaintiff-appellee Pathway Bellows for summary judgment. For the reasons stated below, we reverse the judgment of the district court.

The parties agreed upon all the relevant facts, and the case was submitted to the court below on cross-motions for summary judgment. We briefly summarize those facts before our review of the reasoning and decision of the district court.

On September 24, 1974, Pathway Bellows contracted with the receiving carrier, the San Diego & Arizona Eastern Railway Co. (SD & A) to transport a shipment of metal expansion joints from El Cajon, California to the Gouverneur Iron Works in Oswego, New York. The shipment arrived at its destination on October 22, 1974, where it was delivered by Penn Central, the delivering carrier, in a damaged condition. Pursuant to a telephone request, a Penn Central agent examined the shipment and prepared a Freight Inspection Report dated October 22, 1974, which noted damage, damage which the parties later stipulated totaled $40,000.

One of the provisions of the bill of lading issued by SD & A for this shipment required Pathway Bellows to submit any damage claims in writing, and to file them with an appropriate carrier within 9 months of the date of delivery of the damaged property.[1] The parties have

---

[1] At the time this lawsuit arose, section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11), commonly known as the Carmack Amendment, provided in relevant part that "it shall be unlawful for any . . . carrier to provide . . . a shorter period for the filing of claims than nine months. . . ." On October 17, 1978, the Interstate Commerce Act was revised, codified, and enacted, without substantive change, as subtitle IV of Title 49 of the United States Code. The relevant portion of the Carmack Amendment currently appears, with minor changes in phraseology, as 49 U.S.C. § 11707(e) (Supp. II 1978). Carriers have implemented this statutory directive by including in the Uniform

(footnote continued on following page)

agreed that this 9 month period began on October 22, 1974, and expired on July 22, 1975.

On May 12, 1975, Pathway Bellows sent to Penn Central the following letter:

> Although we have contacted your company earlier, the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage of a shipment to Gouverneur Iron Works, Oswego, New York.

This letter also made reference by caption to the Freight Inspection Report, the Way Bill covering the shipment and the railroad car in which the shipment was transported.

On July 22, 1975, Pathway Bellows sent to SD & A a more detailed letter, which SD & A received the following day. This letter asserted the claim of Pathway Bellows for damages to the shipment of expansion joints, and advanced a specific dollar amount for the alleged liability.[2]

In the district court the sole question for resolution was whether Pathway Bellows had complied with the contractualy imposed condition precedent to maintain an action to recover its damages, *i.e.*, whether Pathway Bellows had timely filed with an appropriate carrier a proper written claim. With reference to Pathway Bellow's letter of May 12, 1975, the court below held that, although timely

---

(footnote continued from preceding page)

Bill of Lading the following provision, which has been approved and prescribed by the Interstate Commerce Commission:

> 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery of the property. . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable and such claims will not be paid.

[2] Pathway Bellyows subsequently sent letters to both Penn Central and SD & A, which amended the amount of damages claimed.

filed, the letter was formally deficient in several important respects, and therefore could not qualify as a proper written claim. We shall defer further discussion of this ruling until we have addressed the district court's treatment of the July 22, 1975 letter.

Penn Central conceded that Pathway Bellow's July 22, 1975 letter contained all elements necessary to classify it as a proper written claim, but maintained that the letter was not timely filed, because although mailed by Pathway Bellows on the final day of the 9 month claim period, it was not received by SD & A until the day after the claim period had expired. Because "filed" was not defined in the bill of lading or in the applicable statute and regulations, the court below regarded the term as somewhat ambiguous. Although recognizing that the word "filed" had a well-established technical meaning in other areas of the law, and that such meaning implicitly equated a filing with the date of receipt of the item to be filed, the court concluded that such a technical construction was inappropriate to a situation involving only private parties. The court noted that, as between private parties, papers are "served" rather than "filed," and the date of service is equated with the date of mailing. Applying this construction of the terms "filed" to the facts of this particular case,[3] the court below held that, because Pathway

---

[3] Although the court below stated that "Were we required to resolve the question . . . whether in all cases a claim is 'filed' upon mailing or upon receipt by the carrier, we would be inclined to conclude that a claim is filed when it is mailed by the claimant," it made every effort to appear not to rely explicitly on this approach but attempted to limit its holding to the factual situation presented in this case. Accordingly, the court framed its holding as follows:

> [A]t least where the shipper has furnished written notice within the period required by the bill of lading that it is in the process of filing a claim for damages, and identifies that claim with some specificity, such a claim when subsequently made and received by the carrier will be deemed to have been filed when it is deposited in the mail, not when it is received by the carrier.

Bellows had mailed a proper written claim on the final day of the 9 month claim period, the claim had been timely filed and the terms of the bill of lading had been timely complied with. Accordingly, the district court denied Penn Central's motion for summary judgment and granted Pathway Bellows's motion, from which grant the defendant-Trustees appeal.

As an initial matter, we agree with the defendant-Trustees that the district court's construction of the word "filed" finds neither support nor precedent in case law. Indeed, relevant authority is uniformly to the effect that a paper will not be considered "filed" until it has been delivered to and received by the party with whom it is to be filed. *See United States v. Lombardo,* 241 U.S. 73 (1916); *Laser Grain Co. v. United States,* 250 F. 826 (8th Cir. 1918); *In re Imperial Sheet Metal, Inc.,* 352 F.Supp. 1149 (M.D.La. 1973); *President & Dirs. of Manhattan Co. v. Laimbeer,* 108 N.Y. 578, 15 N.E. 712, 71 N.Y.S. App. 656 (1888); *Schaffer v. Pennsylvania R.R.,* 127 N.Y.S. 2d 466 (Mun. Ct. 1950), *aff'd,* 127 N.Y.S.2d 468 (App. Term 1952).

We do not believe the present case is sufficiently distinguishable from prior case law to warrant a different construction of the word "filed," and we find that the court below erred in holding that the claim of Pathway Bellows was filed when the letter of July 22, 1975 was deposited in the mail. Instead, we hold that, because SD & A did not receive this letter until the day after the 9 month claim period had expired, the claim was not timely filed as required by the terms of the bill of lading.

We now return to the district court's treatment of the May 12, 1975 letter. In addressing this issue, the court below first determined that the requisite characteristics of a proper written claim had been codified in certain regulations issued by the Interstate Commerce Commis-

sion.[4] The district court then examined the May 12, 1975 letter and found that it lacked two of the three minimum claim filing requirements established by the regulations, for it failed to assert that Penn Central was liable for any loss, and it failed to claim a specified or ascertainable amount of money as damages. Thus the court ruled that the Pathway Bellows letter of May 12, 1975 was not a proper written claim within the meaning of the regulations.

Although we do not agree with Pathway Bellow's argument that the facts do not support the district court's findings relative to the May 12, 1975 letter and that its ruling thereto should be reversed as clearly erroneous, a case recently decided by the U. S. Court of Appeals for the

---

[4] These regulations appear at Part 1005 of Title 49 of the Code of Federal Regulations. The court below found the following sections to be controlling:

§ 1005.2 Filing of claims.

. . . .

(b) *Minimum filing requirements.* A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

Seventh Circuit appears to suggest that the regulations relied on in the court below do not provide the proper standard for assessing the sufficiency of contested claims.

In that case, *Wisconsin Packing Co. v. Indiana Refrigerator Lines,* 618 F.2d 441 (7th Cir. 1980) (en banc), *petition for cert. filed,* 48 U.S.L.W. 3838 (June 12, 1980), the court declared that the subject regulations were intended to apply to voluntary dispositions of claims by carriers so as to insure that the process of claims settlement by carriers would be more expeditious and less subject to discriminatory manipulation, *Id.* at 445. Where, however, the mechanisms of voluntary claims settlement were not employed, *i.e.,* where a carrier disputed its liability and a judicial determination of the validity of the disputed claim was sought, the *Wisconsin Packing* court concluded that the subject regulations did not dictate the form a claim must take. Rather, the sufficiency of a claim in such a situation was to be assessed under the case law in existence prior to the regulations issued by the I.C.C.[5]

---

[5] The governing standard initiallly was set forth by the Supreme Court in *Georgia, Fla. & Ala. Ry. v. Blish Milling Co.,* 241 U.S. 190 (1916), where the Court made clear that satisfaction of the shipper's obligation to submit to the carrier a written claim "does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way." *Id.* at 198.

Through the years, courts occasionally have attempted to refine the very general *Blish Milling* standard. *See, e.g., Insurance Co. of North America v. Newtowne Mfg. Co.,* 187 F.2d 675 (1st Cir. 1961) (written claim requirement will be satisfied by submission of "a written document, however informal in expression, indicating an intention on the shipper's part to claim reimbursement from the carrier for a loss asserted to have occurred in the past, and sufficiently identifying the shipment in question . . . ." *Id.* at 681).

However, because the case law has not brought the contours of a properly constituted claim into very sharp focus, and because

(footnote continued on following page)

Appendix A.

From our examination of the regulations and the relevant source material,[6] we do not believe that the dual

---

(footnote continued from preceding page)

of the well-recognized policy underlying the written claim requirement, *i.e.*, not to permit the carrier to escape liability, but to insure that the carrier may make a prompt and thorough investigation of the claim, *see Blish Milling, supra,* 241 U.S. at 198, courts applying the case law standard have been extremely reluctant to conclude that the written claim requirement has not been satisfied in any situation where a carrier has seen a written document noting damage to a particular shipment and implying the carrier's responsibility therefor. *See Wisconsin Packing Co., supra,* 618 F.2d at 446 and cases there cited.

We do not believe that the ICC, in promulgating the claim-filing regulations, intended a radical departure from the claim investigation policy underlying the written claim requirement. To the contrary, the applicable section of the regulations and the relevant source material indicate a clear intention to encourage the investigation of claims by carriers. *See* 49 C.F.R. § 1005.4; *Ex Parte No. 263, supra,* 340 I.C.C. at 559-68.

Neither do we believe that the ICC, by specifying minimum claim-filing requirements, intended to afford carriers an unfair opportunity to escape liability. The minimum filing requirements appear to call for no more information than one ordinarily would expect a claim for damages to contain, and compliance with these requirements is neither onerous nor unreasonable. To the extent that carriers may escape liability, such "windfalls" may be properly traced, not to the existence of the regulations, but to shippers' unexcused failures to comply with a reasonable condition contained in bills of lading.

However, we do agree with the implicit conclusion of the *Wisconsin Packing* court that the very fact that the regulations identify a properly constituted claim as one that contains certain minimum filing requirements distinguishes the standard established by the I.C.C. regulations from the standard established by the case law.

[6] The regulations were formulated in a rather extensive rule-making proceeding conducted by the ICC. *Ex Parte No. 263: Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims,* 340 I.C.C. 515 (1972). In addition, certain prefatory material accompanied the publication of the regulations in the Federal Register. 37 Fed. Reg. 4257 (March 1, 1972).

standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or to contest its liability, were either intended or mandated.[7] Although we agree with the *Wisconsin Packing* court that the ICC's principal aim in promulgating these regulations was to encourage parties to settle claims instead of resorting to costly time-consuming litigation, and although we recognize that the ICC lacks the ad-

---

[7] Certainly, there is no explicit expression in the regulations themselves that their applicability is intended to be limited solely to those claims that carriers decide to settle voluntarily. To the contrary, 49 C.F.R. § 1005.1, the section dealing specifically with the applicability of the regulations, provides as follows:

> The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each [carrier] . . . subject to the Interstate Commerce Act . . . .

Moreover, the ICC quite clearly stated that

> We are persuaded by the record in this proceeding that our regulations should embrace the full range of matters relating to the filing of claims, including a prescription of minimum filing requirements and a consideration of documents that do not constitute claims, and claims for uncertain amounts. . . . .
>
> . . . Thus, the rules set forth in sections 1005.1 and 1005.2 . . . first establish their overall applicability and then set out the manner and form in which loss and damage claims must be filed by claimants in order to accomplish the improvements shown to be required in the public interest in this area.

Ex Parte No. 263, supra, 340 I.C.C. at 55-56.

It appears, therefore, that the ICC intended to promulgate regulations that would apply generally to all claims and we can perceive no lack of statutory authority vested in the Commission which would frustrate it from fulfilling its intention. See discussion of statutory and case law basis for the Commission's authority to promulgate these regulations in *Ex Parte No. 263, supra,* 340 I.C.C. at 542-46.

judicative authority to pass on the merits of claims,[8] we point out that there is a vast difference between prescribing the form a properly constituted claim must take and that of determining the substantive merits of that claim.

Furthermore, the regulations impose numerous obligations upon carriers, which are triggered by the receipt of a "claim."[9] Having thus required a carrier to take certain actions once a claim is received, we think it is neither inappropriate nor beyond the authority of the ICC at the same time to provide a carrier with some guidance as to what constitutes a claim, so that a carrier may know one when it sees one. Therefore, we agree with the court below that the regulations provide the appropriate standard for assessing the sufficiency of all claims irrespective of the way they may subsequently be resolved or adjudicated.

In summary, we agree with the ruling of the district court that the Pathway Bellows letter of May 2, 1975 was inadequate in form to constitute a written claim. How-

---

[8] The ICC itself was well aware of the limits of its jurisdiction in this area: "This Commission has consistently held that it does not have jurisdiction to determine the merits or the measure of damages of particular loss and damage claims, those being cognizable only in the courts." *Ex Parte No. 263, supra,* 340 I.C.C. at 539.

In an attempt to remedy this lack of jurisdiction, the ICC proposed certain legislation that would have conferred on the Commission original jurisdiction to adjudicate the merits of loss and damage claims. *See Ex Parte No. 263, supra,* 340 I.C.C. at 588-97, 721-22. Congress, however, did not follow the Commission's recommendation and declined to enact the necessary enabling legislation.

[9] *See, e.g.,* § 1005.3(b) (carrier must create individual file and assign file number to claim upon receipt of same); § 1005.3(a) (carrier shall acknowledge receipt of claim within 30 days of receiving same); § 1005.5 (carrier shall pay, decline, or make firm settlement offer in writing to claimant within 120 days after receipt of claim).

ever, we conclude that the district court erred in finding that the Pathway Bellows letter of July 22, 1975 was timely filed when mailed, for we hold that, because this letter was received after the 9 month claim period had expired, it cannot qualify as a timely filed claim. We, therefore, hold that as Pathway Bellows failed to comply with the contractually imposed condition precedent to maintain an action to recover its damages, the defendant-Trustees were entitled to prevail on their motion for summary judgment. Although it may appear Draconian to require that Pathway Bellows lose a $40,000 recovery because its claim letter was received one day late, Pathway Bellows has identified no special circumstances that would entitle it to be relieved of the admittedly severe consequences of its own procrastination.[10]

The judgment of the district court is reversed, and the cause is remanded for entry of judgment in favor of the defendant-Trustees.

---

[10] Had any conduct on the part of Penn Central misled Pathway Bellows into believing that there was no need to file a claim, or that the letter of May 12, 1975 was sufficient to constitute a claim, Penn Central might be held estopped from insisting on Pathway Bellows's compliance with the timely written claim requirement contained in the bill of lading. *See, e.g., Perini-North River Associates v. Chesapeake & O. Ry.*, 562 F.2d 269, 272-73 (3d Cir. 1977). Similarly, if Pathway Bellows could not, in the exercise of reasonable diligence, have ascertained the extent of its loss within the 9 month claim filing period, untimely filing of a completed claim might be viewed as excusable. *See Ex Parte No. 263, supra*, 340 I.C.C. at 554-55.

Nothing in the present case, however, indicates that the reason for the untimely submission of Pathway Bellows's claim was attributable to either of these factors or to any factors beyond Pathway Bellows's control.

Appendix A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 CIV 2100 (LBS)

OPINION #48699

PATHWAY BELLOWS, INC.,

Plaintiff,

—against—

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR, Trustees of PENN CENTRAL TRANSPORTATION CO.,

Defendants.

SAND, D.J.

This is an action by a shipper, Pathway Bellows, Inc. ("Pathway") to recover for damage to a shipment of metal expansion joints. The delivering carrier, Penn Central Transportation Company ("Penn Central")[1] has moved for judgment pursuant to stipulated facts. Penn Central denies liability on the ground that Pathway failed to comply with a condition precedent to maintaining this action, the requirement that it file with the carrier a timely written claim.

The parties agree that the shipment originated in El Cajon, California, and that it was delivered to the consignee, Gouverneur Iron Works, in Oswego, New York, in a damaged condition on October 22, 1974. The San Diego

---

[1] The named defendants are the trustees of the Penn Central.

& Arizona Eastern Railway Company ("SDA") was the receiving carrier. Pursuant to a telephone request made on October 22, 1974, a Penn Central agent examined the property and prepared a report dated October 22, 1974, which noted signs of damage.

On May 12, 1975, Pathway sent to Penn Central the following letter:

> Although we have contacted your company earlier, the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage of a shipment to Gouverneur Iron Works, Oswego, New York.

The letter also made reference by caption to the numbers of two railroad cars, the Way Bill, the Sales Number, and the Freight Inspection Report.

On July 22, 1975, Pathway wrote a letter to SDA, which was received the following day. That letter stated, in pertinent part:

> ". . . We are now in a position to report that the total cost involved as a result of this damage is $89,858.51.
>
> This letter is Pathway Bellows, Inc.'s formal claim to you as a receiving carrier for damage in this amount. Complete documentation of this claim will be forwarded by July 31, 1975.
>
> Notice of this claim has previously been forwarded to Penn Central and Insurance Company of North America."

On July 31, 1975, Pathway wrote two additional letters. One was to SDA, in which it simply revised the amount of its claim from $89,858.51 to $90,157.34 and forwarded certain documentation. The second letter was to Penn Cen-

tral, and read in pertinent part as follows:

> "This letter and its attachments is Pathway Bellows Incorporated's claim for the damage reported per reference [to the October 22, 1974 Inspection Report] in the amount of $90,157.34. . . .
>
> Based on the fact that Pathway Bellows, Inc. engaged Common Carriers including the Penn Central Company to effect the safe delivery of the equipment listed . . . and the fact that the equipment transported on SP Car No. 508623 arrived in damaged condition as evidenced by Penn Central Freight Inspection Report No. 789242 . . . it is requested that the Penn Central Transportation Company reimburse Pathway Bellows, Incorporated in the amount of $90,157.34."

The question before us is whether Pathway filed a written claim within the time limits allowed by the Bill of Lading, section 2(b) of which provides that

> [a]s a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery of the property . . . .
>
> Where claims are not filed . . . in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

It is stipulated that the nine month period for filing of claims expired on July 22, 1975.

The case law governing written claims to carriers has been codified by the Interstate Commerce Commission. 49 C.F.R. § 1005.2 (1978). The filing of a written claim is, first, mandatory and may not be waived by the carrier: "A claim for . . . damage . . . to cargo shall not be voluntarily paid by a carrier unless filed in writing . . . .".

Id. § 1005.2(a). The regulation also specifies "minimum filing requirements":

> A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (1) containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

Id. § 1005.2(b). Pathway contends that both its May 12, 1975 letter to Penn Central and its July 22, 1975 letter to SDA complied with the "written claim" provision. Penn Central contends that neither letter complied, in that the May 12 letter was not a written claim, and the July 22 letter was untimely.

It is apparent that Pathway's May 12 letter was not a claim as that term is defined by regulation. While it identified the railroad cars involved and thus might well have sufficiently identified the shipment, it neither asserted liability for loss nor made a claim for a specified or determinable amount of money. It simply advised Penn Central that Pathway was "in the process of filing a claim for freight damage", and thus that Penn Central might expect to receive such a claim in the future. It is apparent from the May 12 letter that Pathway contemplated that further action was necessary on its part in order to file a claim, and that the letter itself did not constitute a claim.

Even if we found that the May 12 letter did assert liability for freight damage, it did not claim a specified or determinable amount of money. Where a claim is filed for an "uncertain amount", the carrier is directed is determine

"as nearly as posible the extent, if any, of the loss or damage for whch it may be responsible."

> It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

Id. § 1005.2(d). As noted *supra,* paragraph (b) requires that all claims be filed "within the time limits specified in the bill of lading."

Nor is it sufficient, of course, that Penn Central had actual notice of the damage. *American Greetings Corp.* v. *Westransco Freight Co., Inc.,* 75 Civ. 5139 (CMM) (S.D.N.Y. 1976), *aff'd without opinion,* 556 F.2d 554 (2d Cir. 1977); *Atchison, Topeka & Santa Fe Railroad Co.* v. *Littleton Leasing Co.,* 582 F.2d 1237 (10th Cir. 1978). The regulations specifically provide that

> bad order reports, appraisal reports of damage, notations of shortgage or damage, or both, on freight bills, delivery receipt, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

Id. § 1005.2(c).

We turn next to the July 22 letter to SDA. Penn Central contends that, while this letter is a "proper written claim", it is untimely because it was not received until July 23, and Pathway's nine-month claim period ran on July 22. Def. Br. at 5. Defendant contends that a claim is filed only when it is received by the carrier; Pathway's position is that the claim is filed when mailed.

Neither the governing statute nor the regulations define the point at which a claim is "filed". Penn Central cites *United States* v. *Lombardo,* 241 U.S. 73 (1916) and *Schaffer* v. *Pennsylvania R.R. Co.,* 127 N.Y.S.2d 466, *aff'd* 127 N.Y.S.2d 468 (1st Dept. 1952) in support of its position. Pathway relies upon *Bond Stores, Inc.* v. *Overland Package Freight Service, Inc.,* 171 Misc.2d 135, 13 N.Y.S. 2d 928 (Mun.Co. 1939). *United States* v. *Lombardo,* however, was a criminal case, and the issue before the Court was whether, for purposes of venue, the mailing of a document constituted an act within the district. In *Bond Stores,* the facts as reported do not indicate whether the claim was received by the carrier within tbe nine-month period, but only that the carrier acknowledged receipt after the period had expired. *Schaffer* is more apposite, for in that case the court held that the depositing of a claim in the mail was not a filing. In *Schaffer,* however, the claim allegedly mailed in time was never received by the carrier.

Were we required to resolve the question posed by *Schaffer, i.e.,* whether in all cases a claim is "filed" upon mailing or upon receipt by the carrier, we would be inclined to conclude that a claim is filed when it is mailed by the claimant. The term "filed" has a technical meaning, but we do not believe that it is used in that sense in the regulation in question. A document is filed, in the technical sense, when it is received by the Clerk of a Court, F.R.Civ.P. 5(e), or indeed by the Interstate Commerce Commission itself, 49 C.F.R. § 1100.4(b); in this technical sense, it is the date of receipt that governs. Papers which are sent to another party, however, are not filed; they are "served", F.R.Civ.P. 5(a), and service by mail is complete upon mailing. *Id.* 5(b). We believe that, while 49 C.F.R. § 1005.2 uses the term "file" in con-

nection with damage claims made to carriers, the term is not used in its technical sense, but rather to refer to service. In that sense, service may be made by mail, and is complete upon mailing.

The facts before us, however, present a narrower question and we limit our holding to the facts of this case. By its letter of May 12, 1975, the shipper advised the carrier that it was "in the process of filing a claim". Its claim, when filed, was actually received by the carrier. Cases such as *Schaffer* may well be predicated on an unarticulated premise that a rule which made mailing rather than receipt the operative event would be open to abuse based on perjurious claims concerning matters solely within the claimant's knowledge—*i.e.,* whether or when the claimant mailed the claim. Those concerns are not of significant dimensions where, as here, the claimant had gone on record in writing in timely fashion that he is in the process of filing a claim, and the claim ultimately filed is in fact received by the carrier.

We hold that, at least where the shipper has furnished written notice within the period required by the bill of lading that it is in the process of filing a claim for damage, and identifies that claim with some specificity, such a claim when subsequently made and received by the carrier will be deemed to have been filed when it is deposited in the mail, not when it is received by the carrier.

Accordingly, we hold that Pathway's claim was validly filed and defendant's motion for judgment is denied.

Settle Order.

Dated: New York, New York
June 13, 1979

(Sand)
U.S.D.J.

Appendix A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 CIV 2100 (LBS)

OPINION #49148

PATHWAY BELLOWS, INC.,

Plaintiff,

—against—

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR, Trustees of PENN CENTRAL TRANSPORTATION CO.,

Defendants.

SAND, D.J.

Defendant Penn Central Transportation Company has moved for reconsideration of this Court's opinion of June 13, 1979 urging that the Court erred insofar as it accepted the July 22nd letter as constituting a timely filed claim. Plaintiff Pathway Bellows, Inc., while supporting the Court's conclusion with respect to the July 22nd writing, urges that the Court erred in its holding that the May 12th wriitng did not constitute a valid claim. The motion for reconsideration is granted.

We emphasize the fact that we are dealing with a claim filed in 1975. Thus, plaintiff's reliance on cases such as *American Synthetic Rubber Corp.* v. *Louisville & N. R. Co.*, 422 F.2d 462 (6th Cir. 1970), decided prior to the enactment and codification of the Interstate Commerce Commission's Minimum Filing Requirements[1] (37 Fed.

[1] 2 Fed. Carr. Rep. (CCH) ¶ 13,365a.

Reg. 4258 (March 1, 1972), *codified* in 49 Code of Federal Regulations § 1005.2(b) (1973), is misplaced.[2] Moreover, we note, as we did in our prior opinion, that our holding is limited to the special facts of this case. For the purposes of this proceeding, it may be a matter more of semantics or conceptualization than of practical significance whether one says, as we did in our previous opinion, that the July 22nd letter constitutes a claim timely filed or whether one, by analogy to *American Synthetic Rubber, supra,* does not limit the inquiry to the four corners of the May 12th letter but considers all the facts and circumstances, including the July letter, in determining whether a timely claim has been filed. In any event, the result is the same.

Upon consideration, we adhere to our prior decision. The Court holds that Pathway's claim was validly filed and defendant's motion for judgment is denied.

Settle order.

Dated: New York, New York
October 5, 1979

(SAND)
U.S.D.J.

---

[2] We recognize that some courts, *e.g., Portman Curson, Inc.* v. *Hartford Fire Ins. Co.,* 65 A.D.2d 712, 410 N.Y.S.2d 595 (1st Dept. 1978) continue to cite *American Synthetic Rubber, supra,* without acknowledging the impact of the supervening regulation. *But see Cooper Jarrett, Inc.* v. *Melody Stationery, Inc.,* 53 A.A.2d 146, 385 N.Y.S.2d 394 (3rd Dept. 1976) (discussing Interstate Commerce Commission's regulations). For a recent case relying upon the Minimum Filing Requirements, *see Decision Data Computer Corp.* v. *Roadway Express, Inc.,* No. 75-18176 (C.P. Montgomery County, Pa., July 23, 1979).

APPENDIX B

49 U.S.C. § 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title [49 USC §§ 10501 et seq., 10521 et seq., or 10561 et seq.] shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV [49 USC §§ 10501 et seq., 10521 et seq., or 10561 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title [49 USC §§ 1076 et seq.]. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USC §§ 1052 et seq.] to receive property

from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title [49 USC § 10730].

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

(Oct. 17, 1978, P.L. 95-473, 51, 92 Stat. 1453.)

49 U.S.C. § 10101. Transportation policy

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Posal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practires;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1337.)

49 C.F.R. § 1005.2 Filing of claims.

(a) *Claims in writing required.* A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed in writing, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (1) containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of

money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading, or other contract of carriage.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other, carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation on the part of each claimant of his title to the property involved or his right with respect to such claim.